

1. Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Claimant alleges he was run over by his supervisor when the supervisor dropped claimant at his home after a day at work. Respondent alleges the

accident occurred while claimant was traveling home and the “going and coming” rule of K.S.A. 2007 Supp. 44-508(f) applies.

2. Were claimant’s injuries the result of respondent’s negligence?

### **FINDINGS OF FACT**

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed and the matter remanded to the ALJ for further findings consistent with this Order.

Claimant worked as a derrick hand for respondent. As part of his employment agreement with respondent, claimant was required to ride to and from work with David Yott, his supervisor. Mr. Yott would pick claimant up in front of claimant’s house in Great Bend, Kansas, and, at the end of the shift, would return claimant to his house. This travel arrangement paid claimant \$15.00 per day for any trip under 100 miles and \$30.00 per day for any trip over 100 miles.

On September 20, 2007, claimant completed his shift and was returned to his house by Mr. Yott. Claimant exited Mr. Yott’s truck on the passenger side and proceeded across the street in front of the truck. While claimant was walking in front of the truck, Mr. Yott revved the engine. The truck lurched forward, and claimant was struck and run over. Claimant suffered injuries to his left ankle and knee, and two teeth were broken. Claimant is also seeking medical treatment for his low back. Claimant testified that he normally crossed the street behind the truck, but on this occasion, Mr. Yott backed the pickup so that claimant had to cross in front of the truck.

The ALJ denied claimant benefits, finding that the “going and coming” rule of K.S.A. 2007 Supp. 44-508(f) controlled, as claimant’s travel ended the moment he exited the truck. The ALJ reasoned that while crossing the street, claimant was exposed to the same risk of traffic as the general public.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant’s burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

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<sup>1</sup> K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>2</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>3</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>4</sup>

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.<sup>5</sup>

The rationale for the "going and coming" rule is that while on the way to or from work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.<sup>6</sup>

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<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup> K.S.A. 2007 Supp. 44-501(a).

<sup>4</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>5</sup> K.S.A. 2007 Supp. 44-508(f).

<sup>6</sup> *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

The “going and coming” rule is based upon the premise that, while on the way to or from work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Therefore, such risks are not causally related to the employment.<sup>7</sup>

There is an exception to the “going and coming” rule when travel upon the public roadways is an integral or necessary part of the employment.<sup>8</sup>

Respondent argues, and the ALJ agreed, that the travel associated with this job ended the minute claimant exited the truck. This Board Member finds this definition too narrow. While claimant may have been dropped on the street, his presence on that street was necessitated by the requirement that he ride with his supervisor. This arrangement was mutually beneficial to both claimant and respondent. Claimant was provided transportation to and from work, and respondent had the assurance that workers would be at work when needed. Additionally, travel is not confined to the use of a motor vehicle. Claimant was required to walk across the street to access his supervisor’s truck. If claimant were driving his own vehicle, it is doubtful that he would have to cross a busy street to access his own vehicle.

In this instance, the travel inherent with this employment includes claimant’s need to cross the street, both to and from the supervisor’s pickup. Therefore, the accident where claimant was run over by a vehicle driven by his own supervisor is a compensable accident which arose out of and in the course of his employment with respondent. The Order of the ALJ denying claimant preliminary benefits is reversed and this matter remanded to the ALJ for further proceedings consistent with this decision.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>9</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

Claimant has proven that the incident wherein he was run over by his supervisor’s pickup did arise out of and in the course of his employment, as claimant was involved

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<sup>7</sup> *Sumner v. Meier’s Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006).

<sup>8</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

<sup>9</sup> K.S.A. 44-534a.

in travel which was inherent to his job. Therefore, the going and coming clause of K.S.A. 2007 Supp. 44-508(f) does not apply.

**DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bruce E. Moore dated May 12, 2008, should be, and is hereby, reversed and this matter remanded to the ALJ for further proceedings consistent with this Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 2008.

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HONORABLE GARY M. KORTE

c: Robert A. Anderson, Attorney for Claimant  
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge